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In The
# Supreme Court of the United States

MARK N. MATTHEWS,

*Petitioner,*

v.

THE MILITARY DEPARTMENT,
STATE OF LOUISIANA,

*Respondent.*

**On Petition For A Writ Of Certiorari**
**To The Louisiana First Circuit Court Of Appeal**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

The issues presented for review are as follows:

1. Whether Congress exceeded its authority in enacting the self-care provision of the Family Medical Leave Act ("FMLA") as this provision applies to the states?

2. Whether the State of Louisiana waived its sovereign immunity by the adoption of Article XII, Section 10 of the Louisiana Constitution and LSA-R.S. 13:5106(A)?

## PARTIES TO THE PROCEEDINGS

The parties to this action are set forth in the caption.

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## CITATION OF ORDERS UNDER REVIEW

The substantive ruling of which Petitioner seeks review is the opinion issued by the Louisiana First Circuit Court of Appeal on September 24, 2007 in the proceedings entitled "Mark N. Matthews v. The Military Department for the State of Louisiana," bearing no. 2007 CW 1337 on the docket of said court, dismissing the claims asserted under the Family Medical Leave Act ("FMLA").[1] Petitioner applied for a rehearing, which was denied by Order issued on October 31, 2007. He then applied to the Louisiana Supreme Court for a writ of certiorari, but his application was denied on February 15, 2008. Contrary to Petitioner's representation that these rulings are not reported, each of these Rulings is reported in the Southern Reporter. *See Matthews v. Military Dept. ex rel. State,* 970 So.2d 1089 (La. App. 1st Cir. 2007), *writ denied,* 976 So.2d 177 (La. 2008). The Opinions are reproduced in Petitioner's Appendix to his Petition for Writ of Certiorari.

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[1] The Ruling further dismissed a claim assented under the Louisiana Whistleblower Act. Petitioner has not sought a review of the dismissal of his Whistleblower claim, so that portion of the Ruling is not subject to review in the present proceedings.

## STATEMENT OF JURISDICTION

Petitioner bases the Court's certiorari jurisdiction over the present matter on 28 U.S.C. § 1254(1), which provides as follows:

> **§ 1254. Courts of appeals; certiorari; certified questions**
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

By its terms, 28 U.S.C. § 1254 applies only to "[c]ases in the courts of appeal." The matter sought to be reviewed in these proceedings is a ruling issued by the Supreme Court of Louisiana. For this reason, 28 U.S.C. § 1254(1) does not confer jurisdiction over the present matter.

28 U.S.C. § 1257 provides for the review by this Court of "final judgments or decrees" issued by a state's highest court "where the validity of a treaty or

statute of the United States is drawn in question." In this regard, 28 U.S.C. § 1257 provides as follows:

> **§ 1257. State courts; certiorari**
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Since the ruling at issue in these proceedings does not constitute a "final judgment," 28 U.S.C. § 1257 likewise does not confer jurisdiction over this matter.

## STATEMENT OF THE CASE

The present litigation centers on plaintiff's claim that he was terminated from his employment with the Military Department for the State of Louisiana (hereinafter sometimes referred to as "the Military

Department") in violation of the FMLA and Louisiana's whistleblower statutes, LSA-R.S. 23:967 and LSA-R.S. 30:2027. His claims are summarized more fully in the following paragraphs.

Plaintiff, Mark Matthews ("Matthews"), alleges he was hired as an accountant/assistant fiscal officer for the Military Department on February 25, 1996.[2] On November 21, 1997, Matthews reported to his supervisor, Colonel Michael Appe of the Adjunct General's Office, significant errors and omissions committed by the Office of Emergency Preparedness, a branch of the Military Department, concerning the State's disbursement of disaster relief funds in the wake of Hurricane Andrew, which had resulted in the loss of $8.5 million in federal funding reimbursements. Throughout 1998, Matthews cooperated with the Legislative Auditor's Office in its investigation into the matter. The auditor's report, issued on November 24, 1998, was highly critical of the Department with respect to the manner in which it had disbursed disaster relief funds to hurricane victims.

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[2] Throughout the remainder of the Brief, as references are constantly made to allegations contained in the Petition, the writer will not burden the reader with the continuous and repetitive use of the phrases "alleged," "allegedly," "allegations," and similar phraseology when referring to allegations made in the Petition. By not constantly using these phrases, defendant/respondent in no way admits the allegations contained in the Petition.

On June 14, 1999, Colonel Appe reassigned Matthews to the Jackson Barracks, effective July 9, 1999, supposedly in retaliation for his comment concerning the State's handling of the hurricane relief funds. The commute between Baton Rouge and New Orleans proved intolerable for Matthews, who had previously undergone a cervical fusion. On August 13, 1999, Matthews notified Colonel Appe of the potential environmental liability on the part of the State of Louisiana that might be faced because of biochemical waste stored at the Gillis Long Hansen Disease Center located in Carville, Louisiana (hereinafter referred to as "the Disease Center") once the custody of the facility was transferred from the federal government to the State of Louisiana. At this time, Colonel Appe directed plaintiff to discuss any further employment issues with Colonel John Catalonette.

Matthews met with Colonel Catalonette on August 18, 1999 to discuss his treating physician's written recommendation that he discontinue the daily commute to New Orleans on account of his back condition. Notwithstanding the doctor's note, Colonel Catalanotte instructed Matthews to report to duty at the Jackson Barracks on August 20, 1999 and suggested to him that if his back condition prevented him from commuting, he should take sick leave until such time as the condition resolved itself. Matthews received orders on August 19, 1999 to report for military duty in Lake Charles for the period of August 20-22, 1999. In accordance with Colonel Catalanotte's suggestion, Matthews took sick leave on

August 24, 1999. Colonel Appe terminated Matthews on August 25, 1999 in retaliation for his whistleblowing activities and the exercise of his right to leave under FMLA.

Defendant filed an Exception of Lack of Subject Matter Jurisdiction and No Cause or Right of Action, or in the Alternative, Motion for Summary Judgment ("Exception/Motion") on December 1, 2006. The affidavit, employment records, and deposition excerpts filed in support of the Motion for Summary Judgment make it abundantly clear that Matthews was terminated solely because of his repeated refusal to obey direct orders – issued on June 14, July 29, and August 18 and 24 – to report to duty at the Jackson Barracks. With respect to plaintiff's FMLA claim, the Exception/Motion asserted, amongst other arguments/defenses, that Congress exceeded its authority in enacting the self-care provision of the FMLA and that the provision is unconstitutional as applied to the states.

The Exception/Motion was presented to the trial court on May 21, 2006. At the commencement of plaintiff's argument, the ad hoc judge asked plaintiff's counsel to explain how Matthews's alleged whistleblowing could have caused his termination when his termination occurred almost two years after his claimed whistleblowing activities. Rather than addressing the court's question, plaintiff's counsel began a lengthy dissertation as to why, notwithstanding the jurisprudence of virtually every federal circuit court that has addressed the issue to the contrary, the

Eleventh Amendment does not bar an action under the FMLA's self-care provision against a state. Midway through this dissertation, the trial judge interrupted plaintiff's presentation and ruled that the Exception/Motion was denied. Neither the court nor plaintiff's counsel addressed the remaining defenses raised in the Exception/Motion.

The Military Department filed a Writ of Certiorari with the Louisiana First Circuit Court of Appeal. By Ruling issued on September 24, 2007, the Louisiana First Circuit Court of Appeal dismissed the FMLA claims on the basis that the self-care provision does not constitutionally apply to the states. The court further dismissed plaintiff's whistleblower claim relative to the State's potential liability for acquisition of the Gillis Long Hansen Disease Center based on its conclusion that the plaintiff had a duty to report the alleged illegal activities and therefore was not a "whistleblower." *See Matthews v. Military Dept. ex rel. State,* 970 So.2d 1089 (La. App. 1st Cir. 2007). Plaintiff sought a rehearing, which was denied, and later filed a petition for writ of certiorari with the Louisiana Supreme Court, which was also denied. *See* 976 So.2d 177 (La. 2008). Petitioner filed his Petition for Writ of Certiorari before this Honorable Court on May 15, 2008.

## STATEMENT OF CONSIDERATIONS REGARDING GRANTING OF WRIT

Respondent respectfully submits that the decision of the Louisiana Supreme Court, to the extent it denied plaintiff's Application for Writ of Certiorari and allowed to stand the Louisiana First Circuit Court of Appeal's ruling that FMLA's self-care provision is unconstitutional as applied to the states, is consistent with the decisions of every United States court of appeal that has decided the legal issue, except one. This factor weighs heavily against granting the writ of certiorari.

Respondent agrees with Petitioner that the legal question at issue in these proceedings, *i.e.*, whether Congress exceeded its authority in passing the self-care provision of the FMLA, is an important question of federal law that has not been, but should be, settled by this Court. This factor militates toward granting the writ.

## ARGUMENT

### I. CONGRESS DID NOT ABROGATE ELEVENTH AMENDMENT IMMUNITY AGAINST CLAIMS ASSERTED UNDER THE SELF-CARE PROVISION OF FMLA

The State of Louisiana is endowed with sovereign immunity. In this regard, the Eleventh Amendment to the United States Constitution provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

This Amendment precluding federal court jurisdiction over a suit against a state by a citizen of another state also applies to suits against a state or a state agency by its own citizens.

Unless sovereign immunity has been abrogated by an act of Congress or voluntarily waived by a state, the Eleventh Amendment of the Constitution provides immunity to the state from federal court lawsuits brought by private persons. *Hughes v. Savell*, 902 F.2d 376, 377-78 (5th Cir. 1990) (citing *Penhurst State School & Hosp. v. Halderman*, 104 S.Ct. 900, 908 (1984)). Pursuant to statute, Louisiana has not waived its Eleventh Amendment immunity. *Cozzo v. Tangipahoa Parish-Council-President Government*, 279 F.3d 273, 281 (5th Cir. 2002); *Jenkins v. Lee*, 1999 WL 97931 (E.D. La. Feb. 17, 1999).

Whether sovereign immunity also applies to the Louisiana Department of the Military requires some analysis. The Eleventh Amendment bars lawsuits against a state agency if the agency is so closely connected to the state that the state itself is the party in interest. *See Vogt v. Bd. of Comm'rs of the Orleans Levee District*, 294 F.3d 684 (5th Cir. 2002). The courts have previously analyzed the status of state military departments and have determined that the

military department is protected by the Eleventh Amendment from lawsuits brought in federal court. *See Bartley v. U.S. Dept. of Army*, 221 F.Supp.2d 934, 951 (C.D. Ill. 2002) (Illinois Division of Military Affairs); *Moore v. Penn. Dept. Military & Veterans Affairs,* 216 F.Supp.2d 446, 454 (E.D. Pa. 2002) (Pennsylvania Department of Military and Veterans Affairs); *Jones v. New York State Division of Military and Naval Affairs,* 166 F.3d 45, 49 (2nd Cir. 1999) (Division of Military and Naval Affairs); *Bryant v. Military Dept. of State of Miss.,* 381 F.Supp.2d 586, 591 (S.D. Miss. 2005) (Military Department through the National Guard). *See also Day v. Massachusetts Air Nat. Guard,* 167 F.3d 678, 686 (1st Cir. 1999) (immunity extended to the National Guard); *Meadows v. State of Ind.,* 854 F.2d 1068, 1069 (7th Cir. 1988); *Hefley v. Textron, Inc.,* 713 F.2d 1487, 1493 (10th Cir. 1983); *Introini v. South Carolina Nat. Guard,* 828 F.Supp. 391, 392 (D. S.C. 1993); *Roig v. Puerto Rico Nat. Guard,* 47 F.Supp.2d 216, 221 (D. P.R. 1999); *Culbreth v. Ingram,* 389 F.Supp.2d 668, 672 (E.D.N.C. 2005); *Young v. Harmon,* 2003 WL 21918759, *5 (N.D. Ind. May 13, 2003).

By enacting the self-care provision of the FMLA, Congress did not abrogate the states' sovereign immunity from suit. *See Kazmier v. Widmann,* 225 F.3d 519, 524-29 (5th Cir. 2000); *Modica v. Taylor,* 465 F.3d 174, 183-84 (5th Cir. 2006); *Gentry v. Summit Behavioral Healthcare,* 197 Fed.Appx. 434, 437 (6th Cir. 2006); *Touvell v. Ohio Dept. of Mental Retardation and Developmental Disabilities,* 422 F.3d 392,

399-400 (6th Cir. 2005); *Toeller v. Wisconsin Dept. of Corrections,* 461 F.3d 871, 877-80 (7th Cir. 2006); *Miles v. Bellfontaine Habilitation Ctr.,* 481 F.3d 1106 (8th Cir. 2007); *Brockman v. Wyoming Dep't of Family Servs.,* 342 F.3d 1159, 1164-65 & n. 3 (10th Cir. 2003); *Batchelor v. South Florida Water Management Dist.,* 242 Fed.Appx. 652, 653 (11th Cir. 2007); *Garrett v. University of Alabama at Birmingham Bd. of Trustees,* 193 F.3d 1214 (11th Cir. 1999) (self-care provision not a valid abrogation of sovereign immunity). *See also* WRIGHT & MILLER, 4B FEDERAL PRACTICE AND PROCEDURE § 1110 (Supp. 2006); WRIGHT & MILLER, 13 FEDERAL PRACTICE AND PROCEDURE § 3524 (SUPP. 2006). Therefore, the Eleventh Amendment bars plaintiff's FMLA claim against the State of Louisiana.

Petitioner argues that the self-care provision shares the same constitutional fate as the family-care provision of the FMLA, which was upheld by this Honorable Court in *Nevada Department of Human Resources v. Hibbs,* 123 S.Ct. 1972 (2003). In support of this proposition, Petitioner cites the cases of *Bylsma v. Freeman,* 346 F.3d 1324 (11th Cir. 2003), and *Montgomery v. Maryland,* 72 Fed.Appx. 17 (4th Cir. 2003). Petitioner's reliance on these cases is misplaced.

***Bylsma* upheld the *family-care* provision of the FMLA, not the self-care provision.** To be sure, the district court framed the issue before it as follows:

> In this case, the Plaintiff asserts a claim under the FMLA retaliation provision. The

> Plaintiff is, however, claiming that she was retaliated against for having exercised her right to take FMLA leave **to care for *family members*.** Accordingly, this court concludes that the question of the validity of Congress' abrogation of the States' Eleventh Amendment immunity under the retaliation provision is tied to the question of the validity of abrogation of the FMLA provision regarding leave to **care for *family members*.**

*Bylsma v. Bailey, supra* at 1233 (emphasis added). Lest there be any doubt as to the Eleventh Circuit position on this issue, it recently held:

> The issue we must decide is whether, in the light of *Nevada Department of Human Resources v. Hibbs,* 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003), our holding in *Garrett v. University of Alabama Board of Trustees,* 193 F.3d 1214, 1219 (11th Cir.1999), *reversed in part on other grounds,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001), that Congress did not validly abrogate state sovereign immunity through the self-care provision of the FMLA remains good law. **Batchelor argues that the district court construed *Hibbs* too narrowly by holding that the decision only applied to the family-care provision of the FMLA, 29 U.S.C. § 2612(a)(1)(C). We agree with the district court; our decision in *Garrett*, 193 F.3d at 1219, is controlling.**
>
> * * *

> Under the Eleventh Amendment, a State is immune from suit in federal court without its consent. *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 100, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984). "Congress may, however, abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment." *Hibbs,* 538 U.S. at 726, 123 S.Ct. at 1976. In *Garrett,* we held that Congress was without authority to abrogate the sovereign immunity of the states from complaints under the self-care provision of the FMLA. 193 F.3d at 1219. The Supreme Court, in *Hibbs,* addressed the authority of Congress to abrogate state sovereign immunity for claims arising under only the family-care provision of the FMLA. 538 U.S. at 725-740, 123 S.Ct. at 1976-1984. **Our holding in *Garrett* that Congress is without authority to abrogate state sovereign immunity for claims arising under the self-care provision of the FMLA remains the law of this Circuit.** *See Marte,* 356 F.3d at 1344.

*Batchelor v. South Florida Water Management Dist.,* 242 Fed.Appx. 652, 652-53 (11th Cir. 2007) (emphasis added). *Montgomery*'s lack of persuasive authority was recently noted by the Utah Supreme Court:

> Since the *Hibbs* decision, several courts have been presented with the question of whether

> the self-care provision of the FMLA is constitutional. The vast majority of courts have concluded that although the family-care provisions of the FMLA are valid under *Hibbs*, "the self-care provision of the FMLA is unconstitutional insofar as it purports to abrogate state sovereign immunity." For example, the Sixth, Seventh, and Tenth Circuits have all concluded that, in spite of *Hibbs*, the self-care provision is invalid. The Tenth Circuit noted that "at least seven other circuits have held that either subsection (D) alone or the entire FMLA violates sovereign immunity. Some of these decisions have been overruled by *Hibbs* with respect to subsection (C), but the invalidation of the self-care provisions in subsection (D) stands."
>
> **In fact, it appears that the only case that has held that the self-care provision of the FMLA is valid is the Fourth Circuit's unpublished per curiam decision in *Montgomery v. Maryland*. However, in *Touvell*, in concluding that the self-care provision is invalid, the Sixth Circuit noted that the Fourth Circuit's decision in *Montgomery* "gave no explanation for [its conclusion], and we do not consider it persuasive." We agree.**

*Nicholas v. Attorney General*, 168 P.3d 809, 811-12 (Utah 2007) (emphasis added).

Eleventh Amendment immunity applies not only to actions brought against a state in federal court but also to certain actions brought in state court. Thus,

where a state has immunity in federal court from an action based on federal law, it enjoys the same immunity in state court. The lead case on this point of law is *Alden v. Maine,* 715 A.2d 172 (Me. 1998), *writ granted,* 119 S.Ct. 443 (1998), *aff'd,* 119 S.Ct. 2240 (1999). In that case, a probation officer brought a Fair Labor Standards Act (FLSA) action against the State of Maine in state court. The superior court dismissed the action on the basis of sovereign immunity, and an appeal was taken. The Supreme Court of Maine affirmed, holding that state sovereign immunity, as reflected in the Eleventh Amendment, protected the state from suit in its own courts:

> *The principal issue before us is whether state sovereign immunity, as reflected in the Eleventh Amendment, protects the State from this federally created cause of action in its own courts.* Alden contends that Congress has abrogated the State's sovereign immunity by enacting the FLSA. We disagree. Although Congress may have intended to subject the states to the overtime provisions of the FLSA, it does not have the necessary power, pursuant to the Constitution, to accomplish this end.
>
> The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. AMEND. XI. "Although the text of the Amendment would

appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition which it confirms.'" *Seminole Tribe*, 517 U.S. at 54, 116 S.Ct. 1114 (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991)). That presupposition consists of two elements: "that each State is a sovereign entity in our federal system and that '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" *Id.* (quoting *The Federalist No. 81*, at 487 (Alexander Hamilton)) (Clinton Rositer ed. (1961)) (citations omitted).

We have concluded on several occasions that sovereign immunity does protect the State from suit by private parties in its own courts without its consent, even when the cause of action derives from federal law. In *Drake v. Smith*, 390 A.2d 541 (Me. 1978), we considered the question whether the State's enactment of a statutory scheme whereby it became a partner with the federal government in paying medical care costs of certain recipients of federal aid constituted a waiver of state sovereign immunity. We held that because the State had not waived its Eleventh Amendment immunity from suit in federal court, it was not reasonable to conclude that it had waived its sovereign immunity to the same suit in state court. *Id.* at 546.

In *Thiboutot v. State*, 405 A.2d 230 (Me. 1979), *aff'd on other grounds*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), we addressed the amenability of the State to suits by private parties for retroactive AFDC benefits pursuant to 42 U.S.C. § 1983. We held that "in the absence of waiver by the state of its sovereign immunity, the state may constitutionally interpose that immunity as a bar to a class action brought in a state court under § 1983." *Id.* at 237. Similarly, in *Jackson v. State*, 544 A.2d 291 (Me. 1988) *cert. denied*, 491 U.S. 904, 109 S.Ct. 3185, 105 L.Ed.2d 694 (1989), addressing the State's amenability to suit under the federal Rehabilitation Act, 29 U.S.C. § 794, we held that "the State may constitutionally interpose its sovereign immunity in state court as a bar to an award of damages under the Rehabilitation Act." *Id.* at 298. Most recently, *Moody v. Commissioner, Dept. of Human Servs.*, 661 A.2d 156 (Me. 1995), concerned the AFDC program and a violation by the Department of Human Services of the due process rights of the plaintiffs. In reaching the conclusion that the State is protected by sovereign immunity from suit in its own courts, we stated: "The Eleventh Amendment to the United States Constitution precludes the federal courts from circumventing the sovereign immunity of the states. Although the Eleventh Amendment is not directly applicable to state courts, the doctrine of sovereign immunity similarly protects the states from actions [in] state courts." *Id.* at 158 n. 3 (citation omitted).

Reading these decisions in combination, it is clear that we have looked to the Eleventh Amendment to define the contours of state sovereign immunity. *If Congress cannot force the states to defend in federal court against claims by private individuals, it similarly cannot force the states to defend in their own courts against these same claims.* In reaching this conclusion, we have found that the Eleventh Amendment and state sovereign immunity are analogous, to the extent that both protect the State from being forced by an act of Congress to defend against a federal cause of action brought by a private individual. To hold otherwise, by concluding that a state, immune from suit in federal court, must defend against that same suit in its own courts, would effectively vitiate the Eleventh Amendment.

The Eleventh Amendment does not explicitly protect the states from suit in their own courts. That does not, however, end the inquiry. . . . The postulate at work here, state sovereign immunity, is a "background principle" that is "embodied in the Eleventh Amendment." (citation omitted). Thus the Eleventh Amendment does not delimit the scope and effect of state sovereign immunity. Rather, it reflects but one aspect of the states' inherent, more sweeping immunity from suits brought by private parties.

A power so basic and profound would be an odd power indeed if it protected the states from suit in the federal courts but provided no comparable protection in their own courts.

> If Congress does not have the power to abrogate state sovereign immunity with respect to federal causes of action brought in federal courts, as the *Seminole Tribe* case clearly held, then that limitation on congressional power may not be circumvented simply by moving to a state court. Accordingly, *we conclude that sovereign immunity protects the State from defending this federal cause of action in its own courts.*

*Alden v. Maine*, 715 A.2d at 173-75 (emphasis added).

After granting certiorari, this Court affirmed the dismissal of the action and made it quite clear that where a state has immunity in the federal courts from an action based on federal law, it enjoys the same immunity in the state courts:

> We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts. We decide as well that the State of Maine has not consented to suits for overtime pay and liquidated damages under the FLSA. On these premises we affirm the judgment sustaining dismissal of the suit.
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> * * *
>
> We are aware of no constitutional precept that would admit of a congressional power to require state courts to entertain federal suits which are not within the judicial power of the United States and could not be heard in federal courts. . . .

> In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.

119 S.Ct. at 2246 and 2266.

In accordance with these authorities, the Louisiana Department of Military is entitled to Eleventh Amendment immunity for the FMLA claims asserted against it in the present action.

According to Petitioner, even if the Eleventh Amendment does bar his FMLA claims, injunctive relief, including reinstatement and attorney's fees, is nevertheless available to him under FMLA in accordance with *Ex parte Young*.[3] Plaintiff offers no explanation or legal authority as to how any relief can be had under the FMLA when the statute has been declared to be unconstitutional as applied to the states. It would be tautological to hold that Congress exceeded its authority in passing the FMLA, but yet, injunctive relief is nonetheless available under the statute.

Assuming *arguendo* that *Ex parte Young* breathes life into the constitutionally dead FMLA, the *Ex parte Young* exception to the Eleventh Amendment is limited. As the Supreme Court explained, the exception applies only when (1) the suit is against a **state**

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[3] 28 S.Ct. 441 (1908).

**official** and (2) the plaintiff seeks only prospective injunctive relief (3) in order to end a "**continuing** violation of federal law." *Seminole Tribe of Florida v. Florida,* 116 S.Ct. 1114, 1132 (1996). "Where Congress has prescribed a detailed remedial scheme for the enforcement of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young.*" *Id.* In the present action, suit has not been brought against a state official, nor is there a continuing violation of federal law. Accordingly, the *Ex parte Young* doctrine affords no relief to plaintiff. *See Nelson v. University of Texas at Dallas,* 461 F.Supp.2d 504, 508-09 (N.D. Tex. 2006).

## II. LOUISIANA DID NOT WAIVE ITS SOVEREIGN IMMUNITY

Petitioner's most ludicrous argument concerns waiver of sovereign immunity. Petitioner argues that Article XII, § 10(A) of the Louisiana Constitution and LSA-R.S. 13:5106(A) operate as a **waiver** of Eleventh Amendment immunity, such that his FMLA claim is not barred. He notes that while the caselaw uniformly holds that the State of Louisiana has not waived its sovereign immunity to be sued in **federal** court, there is no jurisprudence addressing the waiver of sovereign immunity as to actions brought in **state** court.

Petitioner's argument is deficient on many different levels. First of all, Article XII, § 10(A) of the Louisiana Constitution has absolutely nothing to do

with the Eleventh Amendment – it eliminated the immunity from suit and liability conferred on sovereign bodies under the commonlaw. Secondly, Section 5106 is an **assertion** of sovereign immunity, not a **waiver** of immunity.[4] Thirdly, Section 5106 does not shield the State of Louisiana from suits brought in state court. (To the contrary, the statute mandates that suits against the State be brought in state court).

Petitioner confuses the commonlaw sovereign immunity abolished by Louisiana Constitution Article XII, § 10(A) with the sovereign immunity recognized under the Eleventh Amendment to the United States Constitution. Under the common law, a sovereignty may not be sued. The doctrine of sovereign immunity springs from early English common law where the king was immune from suit by his subjects. It was believed that a king ruled by divine right, hence the idea that "the king can do no wrong." It is also based on the concept that since all rights and laws flow from the sovereign, there can be no legal right or redress against the authority that makes the law on which the very right depends, thus a king could not be held accountable in courts of his own creation. *Schoeffler v. Kempthorne*, 493 F.Supp.2d 805, 813 n. 22 (W.D. La. 2007). Immunity under the Eleventh

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[4] LSA-R.S. 13:5106(A) provides as follows:

No suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court.

Amendment, on the other hand, protects states only against suit in federal court.[5]

## CONCLUSION

For the reasons set forth above, the ruling for which review is sought in the present proceedings is correct. Accordingly, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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[5] Petitioner did not raise his waiver of immunity and *Ex parte Young* arguments until after the Louisiana First Circuit Court of Appeal struck down his FMLA claims. In his opposition memorandum filed in the trial court and in his appellate brief, petitioner's sole argument was that Congress acted within its authority in enacting the FMLA.